IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1238

A. J. BATTERTON, EXECUTOR OF THE WILL OF MARY TODD BATTERTON, DECEASED, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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1. The Government's brief in opposition argues only that petitioner's position on the second question presented by the petition is erroneous. The Government has not one word to say in opposition to petitioner's position on the first question presented by the petition.

It does not try to defend the court of appeals' ruling on question one; it does not deny petitioner's contention that the court of appeals' ruling on this question conflicts with an entire body of tax law. And it could hardly argue that question one is not of great and general importance justifying this Court's attention. Indeed the only discussion whatever in the Government's brief on the first question presented by the petition is that the petitioner is probably right and the court of appeals wrong. The entire discussion is as follows:

> Even assuming that the court of appeals erred in holding that the phrase "public charities" encompasses a broader class of organizations than those qualifying under Section 2055, petitioner would still [lose his case on the basis of question two]. [Br. in Opp. 6]

But the Government's brief is less than candid in not plainly telling this Court that the court of appeals ruled against petitioner, not on question two of the petition, but on question one—and the Government is willing to assume the court below was wrong on question one.

The crucial sentence of the opinion below and its clear *ratio decidendi* is the following:

> The simplest answer to the contention here is that there is no necessary relation between the "charities" to which the surviving spouse here was permitted to make gifts or bequests and the "charities" covered by Section 2055 of the Internal Revenue Code. . . [Opinion on Rehearing, App. 2]

This is the court of appeals' position with respect to question one and the basis on which it ruled against petitioner.

On question two, the court of appeals assumed petitioner was correct (Opinion on Rehearing, App. 1-2). The Government does not argue that question one is not squarely presented, nor that the court of appeals decided the case against petitioner on question two. The Government simply ignores the fact that the court below ruled against petitioner on question one, not question two.

2. In effect, the Government is contending that certiorari should be denied despite the fact that the court of appeals decided an important question erroneously, because the court of appeals' decision is supportable on another ground (that is, question two). This, we submit, is bad law and bad policy. We recognize that this Court reviews cases, not opinions. It would nevertheless be unwise for this Court to deny certiorari where an important question was erroneously decided by the court below simply because the decision is supportable on another ground. The appropriate course in such a case would be for this Court to reverse and remand so that the court below many consider the grounds on which its decision may appropriately be based. (This is especially true here since the court of appeals assumed the decision was not supportable on the basis of the Government's position on question two and, but for the court of appeals' erroneous ruling on question one, judgment would have been in petitioner's favor.) Only in this way can this Court's function as the ultimate guide for lower courts on important questions—especially where, as here, there is a conflict—be preserved.

To adopt the position implicit in the Government's brief would be to leave on the books a clearly erroneous decision on a question of great public importance.

While the Solicitor General now seeks to support the decision below on grounds other than those stated in the opinion, other Government officials will read the decision for what it says. The Internal Revenue Service will use it for its *in terrorem* effect in almost every dispute involving a question of a charitable deduction. This decision will add another string to the Government's bow in almost every case involving a question of a charitable deduction by giving the Government the argument ". . . and even if we are wrong on all our contentions stated thus far, you will still lose because your instrument speaks only about 'charities', not 'charities which qualify under Section 2055 [or the analogous section relating to income taxes]' ". And the Internal Revenue Service will then cite the instant case—if this Court should deny certiorari.

At the moment, petitioner is threatened with an "assumption squeeze". The court below assumed petitioner was correct on the only issue he presented but decided against him—erroneously—on another issue. The Government assumes this ruling to be erroneous but argues that the lower court's *assumption* was also erroneous—and on that ground asks this Court to deny certiorari. It is obviously unfair to petitioner to deny him his victory when the court below assumed he was correct on the only issue he presented and the Government is willing to assume that the court of appeals was wrong on the question it decided. But aside from the unfairness to petitioner if he were to be crushed in this "assumption squeeze", it would also be unwise for this Court as a matter of policy to permit a clearly erroneous opinion on an important question to stand because the decision was supportable on other grounds.

3. Thus far in this reply brief we have assumed *arguendo* that the decision below is supportable on another ground. As a matter of fact, it is not. And so we have argued in that part of our petition relating to question two. And so the court of appeals assumed. The Government contends otherwise, but it has not even tried to address itself to our arguments. It presents only the most general discussion of question two in a brief which could have been written without even reading our petition. In these circumstances, no more need be said on this issue, except to reiterate our position that on the basis of the argument in our petition, certiorari should be granted on issue two as well.

Respectfully submitted,

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